UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL TRADE COMMISSION, STATE OF NEW YORK, STATE OF CALIFORNIA, STATE OF OHIO, COMMONWEALTH OF PENNSYLVANIA, STATE OF ILLINOIS, STATE OF NORTH CAROLINA, and COMMONWEALTH OF VIRGINIA, Plaintiffs, -v- VYERA PHARMACEUTICALS, LLC, AND PHOENIXUS AG, MARTIN SHKRELI, individually, as an owner and former director of Phoenixus AG and a former executive of Vyera Pharmaceuticals, LLC, and KEVIN MULLEADY, individually, as an owner and former director of Phoenixus AG and a former executive of Vyera Pharmaceuticals, LLC, Defendants.	20cv00706 (DLC) OPINION AND ORDER

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DENISE COTE, District Judge:

Trial is scheduled to begin in this antitrust action on December 14, 2021. Defendant Martin Shkreli has moved to preclude the plaintiffs from offering evidence at trial regarding Retrophin, Inc., a pharmaceutical company that Shkreli founded in 2011. The motion is denied.

Background

The plaintiffs seek to prove at trial that Vyera Pharmaceuticals, LLC ("Vyera"), a pharmaceutical company that Shkreli founded in 2014, and the two individual defendants violated the antitrust laws through a scheme that involved, inter alia, purchasing an off-patent, single-source rare-disease drug, raising the price for the drug dramatically, and entering into agreements that effectively closed the distribution system of the drug and blocked competition by generic pharmaceuticals.

The plaintiffs seek to offer evidence that Shkreli pioneered this anticompetitive strategy at Retrophin, which applied the strategy to two drugs that Retrophin acquired and/or licensed: Chenodal and Thiola. After Retrophin obtained control of those drugs it raised their prices by 400% and 2,000%, respectively.

In this lawsuit, the plaintiffs seek to hold Shkreli liable for violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; § 5(a) of the FTC Act, 15 U.S.C. § 45(a); and various state statutes. They seek equitable monetary relief and an injunction banning Shkreli from the pharmaceutical industry.

Discussion

The evidence regarding Shkreli's activities at Retrophin in connection with Chenodal and Thiola is admissible. First, it is admissible as background evidence regarding the conspiracy alleged in the complaint. Evidence of uncharged conduct is independently admissible and is "not evidence of other crimes, wrongs, or acts under Rule 404(b)" if that conduct arose out of the same series of transactions, is "inextricably intertwined" with the conduct at issue at trial, or is necessary "to complete the story" of the claimed offense at trial. United States v. Robinson, 702 F.3d 22, 37 (2d Cir. 2012).

It is also admissible under Rule 404(b) as evidence of motive, intent, plan, knowledge, and the absence of mistake. Fed. R. Evid. 404(b); United States v. Curley, 639 F.3d 50, 57

(2d Cir. 2011). The conduct, as proffered by the plaintiffs, is sufficiently similar to the conduct at issue at trial to permit the inferences argued by the plaintiffs. The probative value of the evidence is not outweighed by any unfair prejudice to Shkreli or any other concern identified by Rule 403.

Finally, if Shkreli is found liable, the evidence is relevant to the request for injunctive relief. That request will require a determination of the extent to which the violation was an isolated occurrence and the degree of willfulness involved. See S.E.C. v. Cavanagh, 155 F.3d 129, 135 (2d Cir. 1998)(listing the factors courts consider in assessing a prospective injunction).

In moving to preclude this evidence, Shkreli argues that the plaintiffs will not be able to prove that Retrophin actually impeded generic competition with either Chenodal or Thiola. It is Shkreli's planning for and initiation of a similar anticompetitive scheme at Retrophin, assuming that the plaintiffs establish that plan and initiation, that is relevant to Shkreli's scienter while at Vyera, not whether the Retrophin scheme succeeded. Shkreli argues as well that absent evidence of actual harm to competition, Shkreli's intent is irrelevant. The plaintiffs seek to prove at trial both that Shkreli conspired to block generic competition with Vyera's drug

Daraprim and that he succeeded in doing so for a not inconsiderable period of time.

Conclusion

Shkreli's October 20, 2021 motion to preclude evidence relating to Retrophin is denied.

Dated: New York, New York
November 5, 2021

DENISE COTE
United States District Judge